

**E. I. du Pont de Nemours & Company, Inc. and  
Martinsville Nylon Employees' Council Corpo-  
ration. Case 5-CA-13337**

7 March 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 22 September 1982 Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent herewith, to amend his remedy, and to adopt his recommended Order, which is modified to reflect the amended remedy.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with relevant information during collective-bargaining negotiations concerning vending machine and cafeteria price increases. He also found that no valid impasse in bargaining was reached because of the Respondent's antecedent unlawful conduct. We agree with those findings and further agree with his recommended remedy requiring the Respondent to furnish the information requested and bargain, on request, with the Union concerning vending machine and cafeteria price changes which have been made and are to be made.

The judge also found that the Respondent, having relied on an invalid impasse to allow and instruct the implementation of food price increases, unilaterally changed employment conditions in violation of Section 8(a)(5) and (1) of the Act. The Respondent excepts to this finding, arguing that an 8(a)(5) unilateral change violation could not arise because, under the Supreme Court's opinion in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), bar-

gaining to impasse is not required before implementation of food price increases. We agree with the Respondent that the established precedent precludes a finding of an 8(a)(5) unilateral change violation under the circumstances presented here.<sup>2</sup>

The Respondent contracts with Macke Company to provide cafeteria and vending machine services at its Martinsville plant, as well as at other Du Pont plants. The contract for Martinsville provides that Macke may establish prices subject to review by Du Pont prior to price changes. Du Pont receives a percentage of Macke's gross receipts and Du Pont has the right to audit Macke's receipts and records. Because of the rotating shift operation at the Martinsville plant and its distance from public eating facilities, the approximately 2700 employees are effectively limited to using the in-plant cafeteria and vending machines. The Union has been recognized by the Respondent as the collective-bargaining representative of its employees in an appropriate unit, and the Union and the Respondent have been parties to successive collective-bargaining agreements. In January 1981 Macke notified Du Pont that it was seeking to raise the prices on approximately 140 food items. The Respondent advised the Union of Macke's notification and thereafter eight bargaining sessions were held between the Respondent and the Union from 26 February to 13 April 1981. The price increases were implemented, in the absence of agreement between the parties, on 13 April 1981.

We have consistently held that prices charged employees for in-plant cafeteria and vending machine services are a mandatory subject of bargaining. *Rockwell International Corp.*, 260 NLRB 1346 (1982); *Ford Motor Co.*, 230 NLRB 716 (1977); *Ladish Co.*, 219 NLRB 354 (1975); *Package Machinery Co.*, 191 NLRB 268 (1971); *McCall Corp.*, 172 NLRB 540 (1968); *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966). The Board's position on this issue was upheld by the Supreme Court in the *Ford Motor Co.* case. However, from the time we recognized in-plant cafeteria and vending machine prices as a mandatory subject of bargaining, we also recognized that the particular nature of this subject warranted a particular type of bargaining obligation. Thus, in *Westinghouse Electric Corp.* above at 1081, we found an 8(a)(5) violation because the respondent rejected the union's request for bargaining about price changes, but we did not

<sup>1</sup> In its answering brief, the Charging Party asserted that the Respondent's exceptions should be "disregarded" for lack of compliance with Sec. 102.46(b) of the Board's Rules. While the Respondent's exceptions do not direct the reader to the excepted-to page and line of the judge's decision, the exceptions essentially quote the excepted-to findings and conclusions and the brief sets forth its argument with references to the decision and transcript. We therefore find the Respondent's exceptions, considered together with its brief, to be in substantial compliance with Sec. 102.46(b) of the Board's Rules. We further note that the Charging Party seemed fully apprised of the issues, as reflected in the argument in its answering brief.

<sup>2</sup> Member Hunter agrees with his colleagues that the Respondent did not violate Sec. 8(a)(5) by unilaterally increasing food prices. Since the judge's finding to the contrary is thus reversed, Member Hunter finds it unnecessary to pass on the propriety of the judge's sua sponte finding this violation in the absence of any specific allegation by the General Counsel.

adopt the administrative law judge's rationale that the violation also stemmed from the respondent's failure to notify the union of proposed price changes. We stated that "it does not follow [from our agreement that cafeteria food prices were a mandatory subject of bargaining] that Respondent was required to bargain about every proposed change in food prices before putting such change in effect." We further stated:

Because of the nature of the restaurant business—the constant and frequently sharp fluctuation in the cost of food ingredients, the large number of individual items sold, and changes in menus—it is impracticable to require consultation with a union before each change in the price of any of the products sold. It is sufficient compliance with the statutory mandate, we believe, if management honors a specific union request for bargaining about changes made or to be made.

Our decision, we explained, did not require the respondent therein or the cafeteria operator to rescind price increases, but only to meet with the union, when requested, to discuss increases in a good-faith effort to reach agreement. In *Ladish Co.*, above at 356–357, we repeated and explained that:

. . . the Board has recognized that an employer who effectively controls the prices charged his employees at in-plant eating facilities cannot practicably be required to consult with a union before he changes the price of any item of food. Rather, our view, which we think is a reasonable one, is that the statute imposes on such an employer the *narrower* obligation to honor a specific union request for bargaining about changes made or to be made. [Emphasis added.]

Corresponding to this position, in setting forth our remedy for the failure to bargain over food prices, we have required respondents to bargain on price changes only after they are "effectuated unilaterally"<sup>3</sup> or "determined unilaterally" and on a request

of the union involved. *Rockwell International Corp.*, above at 1348; *Ford Motor Co.*, 230 NLRB at 718; and *Ladish Co.*, above at 359. We have also rejected requests for rescission of unilaterally implemented price increases by quoting from and citing *Westinghouse Electric Corp.* See *Rockwell International Corp.*, above at 1348. And, finally, the Supreme Court responded to expressed concerns about any small changes in prices triggering the obligation to bargain by setting forth the Board's position, i.e., the above-cited language from *Westinghouse Electric Corp.* concerning compliance with the statutory mandate.

Accordingly, in view of our reiterated position that the bargaining obligation concerning cafeteria and vending machine prices arises after such prices are unilaterally effectuated or determined and thus permits implementation of price changes before bargaining to impasse, we do not affirm the judge's 8(a)(5) unilateral change finding.<sup>4</sup>

#### AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 4 and renumber Conclusion of Law 5 accordingly.

#### AMENDED REMEDY

The judge recommended that, on the Union's request, employees be made whole for the food price increases instituted on 13 April 1981, and that, on the Union's request, pre-13 April 1981 prices be reinstituted. This recommendation was to remedy the 8(a)(5) unilateral change violation. Because we have not affirmed the finding of an 8(a)(5) unilateral change violation, we do not adopt such a remedy. Moreover, we find that the remaining recommendation, requiring the Respondent to furnish the Union with the requested information relevant to the Union's bargaining responsibilities and requiring the Respondent to bargain on request about cafeteria and vending machine price changes which have been made and are to be made, appropriately remedies the violation which we have found and is in accord with existing precedent. *Ford Motor Co.*, 230 NLRB at 719.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, E. I. du Pont de Nemours & Company, Inc., Martinsville, Virginia, its officers, agents, suc-

<sup>3</sup> This language derives from the Fourth Circuit's initial opinion enforcing the Board's decision in *Westinghouse Electric Corp.* See *Westinghouse Electric Corp. v. NLRB*, 369 F.2d 891, 895 (1966), revd. en banc 387 F.2d 542 (1967). In that opinion, it was stated that:

. . . the Board has, in this case, limited its order by the express reservation that the employer need not bargain over proposed price increases in advance, but need discuss such price changes only after they are effectuated unilaterally and upon a specific request of the union.

The language was first repeated by the administrative law judge in *McCall Corp.*, above at 550, and summarily adopted by the Board in that case.

<sup>4</sup> The issue of unilateral changes in food prices made during the term of a collective-bargaining agreement which specifically covers the subject of those prices is not involved here.

cessors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b).
2. Substitute the following for paragraph 1(c) and reletter that paragraph as 1(b):  
 "(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."
3. Delete paragraph 2(b) and reletter the subsequent paragraphs accordingly.
4. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing at which both sides had the opportunity to present evidence, the National Labor Relations Board has found that we violated the law and has ordered us to us to post this notice and abide by its terms.

WE WILL NOT refuse, on request, to bargain collectively in good faith with Martinsville Nylon Employees' Council Corporation, as the exclusive representative of all employees in the bargaining unit described below, with respect to changes in cafeteria and vending machine prices made or to be made. The bargaining unit is:

The unit of employees represented by the UNION shall be all the employees at the Plant, excluding confidential clerks and stenographers, graduate trainees, co-op and summer students, engineers and chemists in training, nurses, guards, Limited Service employees, employees designated as relief supervisors, employees classified as exempt under the Fair Labor Standards Act, all supervisory employees with the rank of supervisor and above, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

WE WILL NOT refuse, on request, to furnish Martinsville Nylon Employees' Council Corporation with information concerning food prices at cafeterias located at other Du Pont plants and serviced by Macke Company, including price surveys, lists of current prices at other plant cafeterias, and other information relevant to negotiations on this subject.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish Martinsville Nylon Employees' Council Corporation with information concerning food prices at cafeterias located at other DuPont plants and serviced by Macke Company, including price surveys, lists of current prices at other plant cafeterias, and other information relevant to negotiations on this subject.

WE WILL, on request, bargain collectively in good faith with Martinsville Nylon Employees' Council Corporation, as the exclusive representative of all employees in the bargaining unit described above, with respect to changes in cafeteria and vending machine prices made or to be made.

E. I. DU PONT DE NEMOURS & COMPANY, INC.

#### DECISION

##### STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge. This case was tried on June 9, 1982, in Martinsville, Virginia, pursuant to a complaint issued on October 9, 1981, alleging that the Respondent refused to provide the Union with relevant information during the parties' negotiations concerning cafeteria food prices, thereby violating Section 8(a)(5) and (1) of the Act. The Respondent's answer admits procedural and jurisdictional allegations in the complaint, but denies that the information sought by the Union is relevant.

On the basis of the entire record, including the demeanor of the witnesses and consideration of the briefs filed by the parties, I make the following

##### FINDINGS OF FACT

##### 1. JURISDICTION

As alleged in the complaint and admitted by the Respondent, I find that the Respondent, a Delaware corporation, engaged, inter alia, in the manufacture of nylon yarns at its plant in Martinsville, Virginia, where it annually receives products valued in excess of \$50,000 purchased directly from suppliers located outside the State of Virginia, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Concededly, the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find.

The complaint allegation that various representatives for the Respondent during the course in negotiations described below are agents and supervisors acting on the Respondent's behalf within the meaning of Section 2(11) of the Act is also admitted and so found. Further, the complaint allegation that the Union has been, and is, the exclusive bargaining representative for employees in a unit appropriate for collective bargaining at the Martin-

ville, Virginia plant pursuant to a series of collective-bargaining contracts is admitted by the Respondent.

## II. THE UNFAIR LABOR PRACTICES

The Respondent runs a nylon yarn-making plant in Martinsville, Virginia, where the 2,700 employees in the bargaining unit are represented by the Union—which has been the employees' bargaining representative for 40 years.

Because of rotating shifts requiring employee presence at or near the plant, as well as the distance from the plant of public eating facilities, some 3 or 4 miles, the employees' options at meal times are limited for all practical purposes to using Du Pont's plant cafeteria—the only eating facility on the plant site. It is undisputed that in practice, the employees do use this cafeteria, where hot and cold meals, as well as vending machines, are available within its 5,000 square-foot area, and that it is very rare that any employee travels off premises to use a public restaurant.

The cafeteria is operated by Macke Company under a lease contract arrangement with Du Pont providing for the payment to Du Pont of a percentage of Macke's gross receipts—which percentage increases when Macke's income reaches the million-dollar level—but in any event, calls for a \$4,000-per-month minimum. Du Pont, the record shows, has the right to, *inter alia*, audit Macke's receipts and provides for lighting, maintenance of equipment, refrigeration, furnaces, and dishwashers.

Regarding any increases in cafeteria food prices, the issue herein, the lease contract provides that Macke has the right to establish prices subject to review by Du Pont prior to such changes. (G.C. Exh. 2, art. IV.) It is clear that in practice Du Pont exercises considerable force amounting to determinative authority, if you like, over Macke's price changing. Thus, Du Pont has, in the past, granted permission to Macke before the latter implemented any changes, and in the present case "instructed" Macke it could go ahead with the disputed price increases. Moreover, it is undisputed that Du Pont has exercised the power to delay price changes and could, if it wished, decide to absorb Macke-requested price increases into its own percentage of gross receipts thereby saving employees increased prices. Clearly, Du Pont's right to terminate the lease contract would also exert a considerable influence on Macke's attitude toward Du Pont's view of any proposed price increases. (G.C. Exh. 2, art. XX.) Finally, I note that, as shall be discussed further below, it was Du Pont that invited the Union to "negotiate" the proposed price increases, which is an express acknowledgement by Du Pont itself that it indeed has control over such subject matter. Any suggestion then, that, as a result of the above lease-contract clause Du Pont had a lesser obligation in negotiations with the Union over food prices because such subject was within Macke's province of authority and outside Du Pont's, is meritless.

As a further preliminary before examining the parties' negotiations, it is instructive to note that the terms in the Macke-Du Pont contract—executed in 1976—and governing the respective rights of those parties were negotiated by a Du Pont Company regional purchasing office

which also negotiates such contracts in other Du Pont plants.

## The Negotiations

Negotiations between the Union and Du Pont over cafeteria food prices at the Martinsville plant are nothing new. The uncontradicted testimony of Union President Harold Goad shows that prior to the instant negotiations beginning on February 26, 1981, and extending to April 13 the same year, these parties previously met for negotiations concerning cafeteria food price increases in December 1979.

Du Pont called this meeting following a request by Macke to increase prices on some five or seven items. During the meeting Roland Wilkens, then industrial relations supervisor, informed the Union, "He just said that they had run a survey and found that the Martinsville plant was paying lower food prices than some of the other plants that had been in the survey." Goad testified that Wilkens produced a letter from Macke to Du Pont justifying the price increases and referring to such survey. (G.C. Exh. 4.) The letter states, *inter alia*, while describing efforts to keep prices down that, "In a recent survey with other Du Pont Plants it is quite obvious that our prices [at the Martinsville plant] on most items are well below theirs." After considering the matter, the Union agreed to the proposed increases a week later.

The parties again had occasion to meet on this general subject in July 1980 with the result that an agreement was reached to raise various prices and also, to make improvements in vending machine services.

The series of negotiations concerning the subject matter of price increases leading to the present case began on February 26, 1981, and consisted of eight meetings convened specifically to discuss 10-letter pages of price increases proposed by Macke in a letter to Du Pont dated January 20. (G.C. Exh. 5.) For present purposes, it suffices to summarize the first five of those meetings, held on February 26 and March 3, 11, 18, and 31, in brief, by noting that the first meeting mainly was devoted to Du Pont presentation of Macke's proposed increases and justification of same in the form of a comparison sheet denoting current Macke costs compared to costs on July 30, 1980. (G.C. Exh. 6.) In the second and third meetings, the Union voiced concern over food quality and vending services and opposed the increases, which Du Pont defended in part by indicating Macke was not making much money on some types of food and sold only what was profitable. In the fourth meeting, the Union requested, *inter alia*, a copy of the Macke-Du Pont agreement and made proposals for a microwave oven and refrigerator. At the fifth meeting on March 31, the Union was given a copy of the above contract and agreed to two vending machine and cafeteria items, but there was no agreement on any further price increases.

It is within the time frame covering the last three meetings that the question central to this case arises. While going through union files in preparation for the sixth meeting to be held April 8, Union President Goad and others came across the December 1979 letter reference to a survey of prices made at other Du Pont plants,

which had been used by Du Pont officials in negotiations at that time to justify proposed increases in cafeteria food prices, at the Martinsville plant, as described hereinabove. The Union decided it needed that information—prices at other Du Pont plants serviced by Macke—and prepared a request to make at the next meeting. Some time before that meeting occurred the Union had occasion to meet with management in a regularly scheduled “monthly meeting” during which a conversation about vending machine prices led to the observation by one of the participants that the Union and Du Pont were in negotiations concerning cafeteria prices. According to the undenied testimony of Goad, during such meeting attended by Plant Manager Kenneth Steuber and Assistant Plant Manager Ferrante (as well as Goad and other union representatives) mention was made of the survey information whereupon, Goad testified, Steuber stated, “We have some information like that occasionally,” adding he did not know if he had that up to date or not. Steuber, it should be noted, was plant manager during the December 1979 negotiations at which time Du Pont relied on the survey of food prices at other Du Pont plants to justify the price increases being proposed then. His testimony on the point was similar to Goad’s.

At any rate, the Union followed through on earlier intentions and, at the sixth meeting on April 8, Union Vice President Leon Cassidy submitted a request to Industrial Relations Supervisor Johnny Watkins for information consisting of the prices charged by Macke at other Du Pont plants, informing Watkins the union request was made because such information would help the Union formulate a proposal. Cassidy further testified without contradiction that the Union, in this connection, informed Du Pont that it thought prices at Du Pont’s Waynesboro plant were lower than those charged at the Martinsville plant. Cassidy recalled that company representatives seemed receptive to the request at that time.

At the seventh meeting on April 9, President Goad again asked for the information requested by the Union through Cassidy at the previous meeting. Goad explained to the Respondent’s representatives that the information was relevant pointing to the 1979 negotiations, because the Union needed it, “in order to sit down and look with the other information we had received from them in order to make some kind of counterproposal to them on the price increase.” Company Representative Watkins, according to Goad, responded that it was not available for negotiations, and asked if the Union had anything else on any counterproposals. Goad replied, “not without the information.” Whereupon, Matthews announced the parties had reached an impasse and that the Company was going to go ahead and implement the price increases.

Industrial Relations Supervisor Watkins did not contradict the testimony above in any substantial respects. In fact his account is highly corroborative to this point, of the Union’s version in events. Watkins testified in fact that the Union requested prices from other locations as early as the April 8 meeting and that he admitted seeing in the past some information from other locations but that he did not think he had anything up to date, later stating to the Union he did not consider such information

relevant. To further questioning he admitted seeing such information on three or four plants in 1978 and 1979—which he later discarded as old. Watkins testified that he told the Union, in defending his refusal to furnish the information, that Macke’s services at Martinsville may be different from the service it renders elsewhere and that Macke had not used such information as a basis for the presently proposed increases. Watkins recalls the Union asking if there was impasse and that he stated “correct.”

Reacting swiftly to the Company’s assertion of impasse, and its intention to allow the price increases to go into effect on April 13, the Union by hand-delivered letter the same day to Watkins protested Du Pont’s refusal to furnish the information, restated in depth the reasons such information was relevant to the Union in negotiations, and specifically asserted that, in the Union’s view, negotiations were not at impasse, repeating its request for the information as such was “necessary for the Union to formulate proposals,” and asking the Company to reconsider the decision to have the price increases implemented. (G.C. Exh. 7.) This letter’s clear import, *inter alia*, is to request further bargaining over the price increases proposed.

In response to the Union’s letter, the Company called a meeting on April 13, which the Union attended and during which Watkins reviewed negotiations but refused to furnish the requested information, repeating that it was not relevant. Significantly, *at the same time*, Watkins, as described by Union President Goad, stated that the price increases that Macke was asking for were in line with other plants. Watkins admits the first part of the above sentence, viz, that the price increases that Macke was asking for were in line—but testified that he completed that sentence by saying “with other eating establishments in our area.” Under Goad’s version, of course, Watkins, in the same breath when he said the requested information was not relevant, would be demonstrating its relevancy by defending the increases as being in line with other plants. Nevertheless, it is Goad’s version that I adopt as the reliable account over Watkins. There was no hint whatsoever in the parties’ relationship and contacts regarding price increases in the Martinsville plant over the several years involved to the cost of food in local restaurants yet there were a significant number of occasions when references were made to food prices at other Du Pont plants serviced by Macke—references made right up to the meeting on April 13. It would therefore not be a reasonable likelihood that, in defense of the price increases at the plant, Watkins for the first time would shift the Company’s defensive ground to totally unfamiliar territory and for the first time—when the parties were arguing over the production of price figures at Du Pont plants—make the argument that the price increases proposed by Macke were in line with public restaurants. This conclusion seems further supported by the view that such an argument would foreseeably carry little weight given the significant differences in overhead expenses obtaining at public restaurants and Du Pont plant cafeterias, as well as by the fact, admitted by Watkins under closer questioning, that he had not, in fact, made any survey of such local restaurant prices and thus

could not have reasonably hoped to succeed in making his point. On the other hand, the version tendered by Goad is favored by greater likelihood when placed into the scheme of things as Watkins might well have expected he could short circuit the Union's request for information by attempting to establish that such information would not be of any use to the Union since the prices were in line with other plants anyway. Since, in addition, I found Watkins' testimony concerning the incomplete manner in which the Respondent "reviewed" Macke's price increases for justification unreliable, I am further inclined to adopt Goad's version of events. Even were one to conclude that such a reference as described by Watkins had been made, it is clear that comparison pricing was then a large factor on the bargaining table.

There was no agreement reached that day and, notwithstanding that the Respondent and the Union had not agreed to the price increases, they were implemented that day, April 13.

#### Analysis and Conclusions

The governing principles in deciding whether an employer is required to furnish the union with information are well established and require little restatement herein. The answer depends on whether, broadly viewing the term, the information is relevant and reasonably necessary to the union's bargaining responsibilities. Under the settled view, it is enough that it would be probable that the desired information was relevant to require its production. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Acme Industrial Co.*, 385 U.S. 432 (1967); *Curtiss-Wright Corp.*, 347 F.2d 61 (3d Cir. 1965); *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); and *Weber Veneer & Plywood Co.*, 161 NLRB 1054 (1966). A corollary is that the General Counsel need not establish unquestionable relevancy or dispositive force therein for negotiating between the parties, it being sufficient that the information have a potential relevance. *Western Massachusetts Electric*, 228 NLRB 464 (1977). With reference to the requested information in the present case, since such information pertained to nonunit matters, the burden lay on the Union to establish such relevancy, but it is clear no unusual or heightened standard of relevancy applies to nonunit information, it being sufficient that it be considered relevant and potentially helpful. *Press Democrat Publishing Co.*, 237 NLRB 1335 (1978), and cases cited therein.

Relevance and necessity in turn logically depend on the bearing of the matter sought to apparent issues or problems in the specific case, keeping in mind, as well, that the union must not be unlawfully thwarted in its responsibility to "intelligently perform its statutory function of evaluating Respondent's proposals and formulating contract proposals of its own [emphasis added]." *Northwest Publications*, 211 NLRB 464, 465 (1974). It is clear also, that plant cafeteria prices and services in situations like the instant one are mandatory subjects of bargaining under Section 8(d) of the Act. *Ford Motor Co.*, 230 NLRB 716 (1977), and cases cited therein.

Turning to the facts in this case, it is striking to note that Du Pont, itself, placed before the Union the fact that cafeteria prices at other Du Pont plants figured

heavily in its defense of raising prices at Martinsville when, in prior negotiations in 1979, it relied on such information gathered in a survey to support the argument that Martinsville cafeteria prices were lower than those at other Du Pont plants, and then again in the 1981 negotiations relied on such type information when Watkins took the position that Martinsville plant prices were in line with prices at other Du Pont plants. The Company having clearly presented and strongly relied on such information to support the proposed price increases notwithstanding its disclaimer on one occasion to the contrary in negotiations with the Union, it follows that the Union was then entitled to such information in order to evaluate the Respondent's proposals and formulate its own counterproposals. *Northwest Publications*, supra. Given Du Pont's manifestations in its conduct that its defense for increasing Martinsville plant prices was based on and influenced by prices at nonunit plants, it follows that information regarding such prices is relevant and necessary to the Union's performance of its responsibilities in the Martinsville plant negotiations. *Lamar Outdoor Advertising*, 257 NLRB 90 (1981).

The record in such respects establishes the necessity for such information to enable the Union to analyze the reasonableness in the Respondent's proposals and to formulate its own counterproposals. Thus, the testimony offered by the Union indicates specifically that a lower or higher price comparison with other Du Pont cafeterias could directly influence the Union's response to Du Pont's proposals; in fact, the Respondent's plant manager admitted in response to questioning that the Union could argue that lower prices at other plants would warrant lesser prices at Martinsville. At any rate, since the Respondent had placed the issue of other plant cafeteria prices in contention, information concerning such subject was clearly relevant to the negotiations on such additional basis. See *Western Massachusetts Electric Co. v. NLRB*, 573 F.2d 101 (1st Cir. 1978), and *Teleprompter Corp. v. NLRB*, 570 F.2d 4 (1st Cir. 1977).

Du Pont, I find, clearly violated Section 8(a)(5) and (1) of the Act when it refused to furnish such relevant information to the Union despite the Union's repeated requests accompanied by supporting valid reasons.

Du Pont's unlawful conduct extended beyond its unwarranted conduct in refusing the Union's request for relevant information when it instructed Macke it could proceed to implement the price increases effective April 13, without having secured the Union's agreement to such change in existing employment conditions, thereby unilaterally changing said conditions. This result follows from the fact that Du Pont could not rely on an impasse created by its own unlawful conduct as an excuse to unilaterally change existing cafeteria food prices. Accordingly, when Du Pont failed to bargain in good faith with the Union over such prices by refusing to furnish the Union with relevant information, such unlawful conduct prevented a valid impasse—which can justify unilateral action—from arising. *Atlas Metal Parts Co.*, 252 NLRB 205, 223 (1980); *Inta-Roto Inc.*, 252 NLRB 764, 768 (1981); and *Newspaper Printing Corp.*, 232 NLRB 291 (1977). I therefore conclude Du Pont further violated

Section 8(a)(5) and (1) of the Act by the unilateral change in employment conditions resulting from the increased cafeteria food prices,<sup>1</sup> and a remedy for this violation as well shall be recommended pursuant to request by counsel for the Charging Party. *Stokely-Van Camp*, 259 NLRB 961, 963 fn. 14 (1982);<sup>2</sup> *Peat Mfg. Co.*, 251 NLRB 1117 (1980); *Weyerhaeuser Co.*, 251 NLRB 574 (1980); and *Norton Concrete Co.*, 249 NLRB 1270, 1274 (1980).

#### CONCLUSIONS OF LAW

1. E. I. du Pont de Nemours & Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of the Act and has been and is the exclusive bargaining representative of employees in the following unit appropriate for the purposes of collective bargaining as described in the parties' collective-bargaining agreement:

The unit of employees represented by the UNION shall be all the employees at the Plant, excluding confidential clerks and stenographers, graduate trainees, co-op and summer students, engineers and chemists in training, nurses, guards, Limited Service employees, employees designated as relief supervisor, employees classified as exempt under the Fair Labor Standards Act, all supervisory employees with the rank of supervisor and above, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

3. The Respondent, by refusing to furnish the Union, on the Union's request, with relevant information concerning negotiations over proposed price increases for food and other items at the Martinsville, Virginia plant cafeterias during the period February 26 to April 13, 1981, has failed to bargain in good faith with the Union thereby violating Section 8(a)(5) and (1) of the Act.

4. The Respondent, by allowing and instructing the implementation of price increases of food and other items at the Martinsville, Virginia plant cafeteria effective April 13, 1981, without first bargaining in good faith with the Union, on the Union's request for such bargaining, thereby unilaterally changed conditions of employment in violation of Section 8(a)(5) and (1) of the Act.

<sup>1</sup> The Respondent's defenses that the Union's bargaining requests for the information were made in bad-faith jest and as a tradeoff for other goals are not supported by the record nor would such latter point have any legal significance to the issues in this case, as the tradeoff of proposals is common in lawful collective-bargaining negotiations. The Respondent's contentions, in short, are irrelevant recriminatory defenses which lack merit. *Carpenter Sprinkler Corp.*, 238 NLRB 974, 983 (1978); and *American Gypsum Co.*, 231 NLRB 1291, 1299 (1972).

<sup>2</sup> Thus, this issue was fully litigated and is closely related to the "heart of the complaint." *Furr's Cafeterias*, 251 NLRB 879 (1980). More importantly, the operative facts forming the basis for the violation are well established in the record and are nearly entirely admitted by the Respondent. Finally, the additional violation found herein emerges from the parties' entire series in negotiations which were prompted by the single subject of increases in food prices, so that such violative conduct emerges with particular clarity.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

The Board has made clear in prior decisions involving in-plant cafeterias that certain principles apply due to the nature of the restaurant business which constitute departures or exceptions to the normal obligations imposed on employees to notify and consult with incumbent bargaining representatives before changes in existing employment conditions are determined. Thus, in *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), the Board (at 1081), noting restaurant operation dynamics decided it would be "impracticable to require consultation with a union before each change in the price of any of the products sold." The Board then addressed what the obligations in such price-changing situations are by stating, "It is sufficient compliance with the statutory mandate, we believe, if management honors a specific union request for bargaining about changes made or to be made [emphasis added]." Subsequent cases affirmed this holding. *Ford Motor Co.*, supra, and cases cited therein.

The present case, wherein there is only a single union representing plant employees, and thus no great concerns need be expressed over confusion arising from multiple-union negotiations on the subject; where employees, viewing their situation realistically are in a position akin to being captive patrons; wherein the business generates over a million dollars in receipts annually with Du Pont sharing a substantial percentage of such receipts as well as an additional percentage over the million-dollar mark with, in addition, a guaranteed minimum; and finally where Du Pont's control over daily maintenance operations, audits of Macke's books, review of prices, demonstrates control over price changes, and its control flowing from its implicit considerable influence vis-a-vis Macke decisions in this high income producing enterprise arising from its right to cancel the contract, all combine to make this case as strong or stronger for holding that the price increases herein were clearly mandatory subjects of bargaining as to which the former cited precedent applies.

Thus, despite the Union's continuing desire to bargain over the price increases as manifested by its participation in such negotiations from February to April 13, 1981, as well as by its letter of April 9, seeking continuing negotiations and protesting Du Pont's announced unilateral action, announced April 9 and implemented April 13, Du Pont instructed the earlier proposed increases, covering some 143 items and constituting substantial percentage increases in prices, be placed into effect. The only legal justification advanced in negotiations by Du Pont was that the negotiations were at an impasse, an impasse which is hereinabove found invalid since it arose from Du Pont's unlawful conduct in refusing relevant information to the Union.<sup>3</sup> By such conduct, the Respondent, it

<sup>3</sup> It is clear, as well, that the Union had not been intransigent in price increase situations either in the past, when it had accepted the Respondent's proposals, or in the present case, where it had agreed to some increases so that factually, as well, it could not be said that there was no hope for an agreement or that an impasse existed.

has been found, failed to meet its obligations under cited cases to bargain over price changes made, or, as is the case here, *to be made*.

Although the cited precedent, including *Westinghouse*, involved refusals by the employer to bargain occurring both *before* and after changes in cafeteria prices were put into effect, the remedy applied in these cases did not, as it happens, include an order to rescind such increases—even those effectuated unlawfully in the aftermath of a specific request or conduct amounting to the same thing by the union for bargaining at a time when such changes had not yet been effectuated and were in the *to be made* category. No express statement is contained in such cases why a remedy in the nature of a restoration of the status quo ante, such as normally (aside from few exceptions not applicable herein) would apply to unlawful unilateral changes was not applied therein. *Turnbull Enterprises*, 259 NLRB 934 (1982).

Rather, it appears that in *Westinghouse*, while addressing the dissent, the majority noted, "We would note that the *present* decision does not require either Respondent or the cafeteria operator to rescind price increases." (Emphasis added.) Decisions following *Westinghouse*, including the Board's decision in *Ford Motor Co.*, supra, cite the *Westinghouse* main holding that the bargaining obligation *arises* only on a request of the union, and remain silent as to why a restoration of the status quo ante is omitted from the remedy.

In the absence of any rationale expressly set forth in prior decisions against considering a remedy in the nature of an order aimed at restoring the status quo ante, I conclude there is no blanket restriction against such remedy merely because a case arises involving in-plant food prices and such remedy has not in such cases hitherto been ordered or could be uncovered.

In the present case, the Respondent's employees represented by the Union have been saddled with substantial price increases, in some 143 food and other items since April 13, 1981, as a result of the Respondent's unlawful conduct in allowing the price changes without fulfilling its bargaining obligations.<sup>4</sup> During this time period, as dictated by the Macke-Du Pont contract, Du Pont has received a substantial guaranteed percentage (over 4 percent) of the unlawfully increased receipts (or \$4,000 per month whichever is greater), as well as 10 percent of the excess over \$1 million in gross receipts which will include receipts by year's end increased by the food price changes (G.C. Exh. 2). Since the lowest prices discontinued by Du Pont's action constituted a benefit unilaterally deprived employees in contravention of their rights under the Act to full representation in such matters, and, since said employees have been paying the costs for such improper conduct, it is only fair that Du Pont, I will recommend, on the Union's request, make employees whole for their losses arising from the discontinuance of the former lower food prices during the period beginning April 13, 1981, and the Respondent's compliance with this recommended Order. This would not be an unfair

burden on the Respondent, which enjoyed increased income from the price changes and was responsible for *allowing* the changes unlawfully. Nor would such a remedy impose an "undue" burden on Du Pont, which has the right to audit Macke's accounts and, therefore, could determine the extent of employee losses.<sup>5</sup> In addition, it shall be recommended that, on the Union's request, prices which were unlawfully increased be rolled back to those in effect on April 13, 1981, until such time as the Union and the Respondent, on the former's request, bargain about the changes to be made to an agreement or to the point of a valid impasse. It shall also be recommended that the Respondent be ordered to furnish the Union with information relevant to the Union's bargaining responsibilities as described herein and that the Respondent, on request by the Union, bargain in good faith concerning cafeteria price changes made or to be made.<sup>6</sup>

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommendation<sup>7</sup>

### ORDER

The Respondent, E. I. du Pont de Nemours & Company, Inc., Martinsville, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain collectively in good faith over cafeteria prices with Martinsville Nylon Employees'

<sup>5</sup> While some complexity can attend such remedy's implementation, the responsibility for the situation in which the employees find themselves is the Respondent's, which is free to pose satisfactory formulas in the compliance stage, where, for example only, the parties might agree, with approval of the compliance officer, to lowering prices *beyond* the rolled-back price level to an extent, and for a period, which would equal the sum of the price increases paid by employees from April 13, 1981, until the rollback. Any sums found to represent the monetary losses from these increases by employees, which are not to be limited to Du Pont's increased income, but rather shall be represented by the entire amount of price increases, shall be subject to interest in accord with established precedent. *Florida Steel Corp.*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

A possible means for determining the make-whole sum is to ascertain the average percentage increase in prices for all items by using G.C. Exh. 6 and the attachment thereto. With this percentage in hand, it may fairly be concluded that the gross receipts covering the period April 13, implementation date, and the date rollback is effective will yield a fair and reasonable make-whole sum when multiplied by that percentage figure. The question how to convey that sum back to employees—viz, which employees are to get how much—is somewhat complicated by the nature of the cafeteria procedures themselves, and by the fact that nonunit personnel also purchased meals there during this period. A reasonable and practical solution would be to assume that the same ratio of unit to nonunit personnel continues to take meals in the cafeteria so that a price reduction *beyond* rolled-back price levels to an extent and for a period of time until the differences in the rolled-back prices and the further price reductions equaled the make-whole sum would afford employees a fair approximate reimbursement of their losses flowing from the unlawful price increases. The expertise in the Board's compliance offices, at any rate, makes it reasonable to conclude that together with the parties' efforts, compliance can be achieved with fairness to all concerned.

<sup>6</sup> References herein to cafeteria prices include cafeteria food and vending items.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup> It has already been determined herein that Du Pont exercises de facto control over food pricing in its plant cafeteria at Martinsville, Virginia.

Council Corporation, as the exclusive bargaining representative of employees in an appropriate unit by refusing to provide, upon the Union's request, relevant information concerning such subject matter. The appropriate unit is:

The unit of employees represented by the UNION shall be all the employees at the Plant, excluding confidential clerks and stenographers, graduate trainees, co-op and summer students, engineers and chemists in training, nurses, guards, Limited Service employees, employees designated as relief supervisors, employees classified as exempt under the Fair Labor Standards Act, all supervisory employees with the rank of supervisor and above, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

(b) Failing to bargain collectively in good faith with the Union by unilaterally allowing changes in cafeteria prices.

(c) In any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of employees in the above-described unit.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Furnish the Union with the requested information relevant to negotiations over cafeteria prices as described

hereinabove<sup>8</sup> including cafeteria food and vending items and, on request, bargaining about price changes.

(b) On the Union's request, reinstate the cafeteria food and vending item prices unilaterally increased on April 13, 1981, and make employees whole for any losses they incurred as a result of such higher prices between April 13, 1981, and the date prices are rolled back in the manner set forth in the section of this Decision entitled, "The Remedy."

(c) Post at its plant in Martinsville, Virginia, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>8</sup> Including the survey or other information reflecting cafeteria prices charged employees at other Du Pont plants as requested by the Union i.e., information relevant for price comparison purposes in connection with the parties' February through April 1981 negotiations.

<sup>9</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."